No. 22,405

United States Court of Appeals

For the Ninth Circuit

LLOYD E. HILDEBRAND,
Appellant,

vs.

GREAT AMERICAN INSURANCE CO.,
Appellee.

Appeal from the Judgment of the United States District Court for the Eastern District of California

Honorable Oliver J. Carter, United States District Judge

APPELLANT'S OPENING BRIEF

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STATEMENT OF JURISDICTION

The jurisdiction of the District Court is based on diversity of citizenship in a controversy involving more than $10,000.00. The complaint alleges that appellee is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business in the City of New York, State of New York, and that appellant is and was a citizen and resident of the State of California (Tr. 1). The complaint further alleges that the amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00 (Tr. 1 and 2). These allegations

are admitted in paragraphs 1, 2 and 3 of the agreed statement of facts (Tr. 121). The trial court directed that its memorandum for judgment will constitute the findings of fact and conclusions of law by the court in accordance with Rule 52(a) of the Federal Rules of Civil Procedure (Tr. 183). Although the jurisdictional facts are not set forth in the memorandum of judgment, it is believed that the agreed statement of facts takes the place of formal findings of fact by the court, and that such formal findings of fact are neither necessary nor proper (*Saltonstall v. Russell,* 152 U.S. 628, 14 S. Ct. 733).

Therefore, jurisdiction exists under Title 28, Section 41, United States Code Annotated.

STATEMENT OF THE CASE

The appellant, a codefendant in the lower court, is an individual doing business under the name Valley Elevator Company (Agreed Statement of Facts, paragraph 2, Tr. 121). Appellee, plaintiff in the lower court, is an insurance company with its principal place of business in New York City, New York (Agreed Statement of Facts, paragraph 1, Tr. 121).

Prior to the accident hereafter described, Erickson Bros., a corporation, and Emmanuel Schwaub were the owners of a warehouse building located at 921 Front Street, Sacramento, California (Agreed Statement of Facts, paragraph 4, Tr. 121 and 122). Prior to the date of the accident, September 7, 1967,

appellee issued to Erickson Bros. a comprehensive multiple liability policy, which said policy was in effect on September 7, 1957 (Agreed Statement of Facts, paragraph 14, Tr. 123).

Commencing some time prior to October 1, 1956 and continuing thereafter, defendant H. C. Evans, doing business as Evans Van & Storage Company, leased from Erickson Bros. and Emmanuel Schwaub the entire warehouse building located at 921 Front Street, Sacramento, California (Agreed Statement of Facts, paragraph 5, Tr. 122). The lease was on a month-to-month basis and during the entire period of time relevant herein, H. C. Evans, doing business as Evans Van & Storage Company, had the sole right of possession to the premises (Agreed Statement of Facts, paragraph 6, Tr. 122).

Located in the warehouse building at 921 Front Street was a freight elevator which was used by H. C. Evans, doing business as Evans Van & Storage Company, in the furtherance of his warehouse business. The use of this elevator was with the express understanding that H. C. Evans, doing business as Evans Van & Storage Company, was to be responsible for the use, maintenance and inspection of said elevator (Agreed Statement of Facts, paragraph 7, Tr. 122).

H. C. Evans employed appellant to place the freight elevator in working condition and entered into an inspection service contract with appellant in connection with the use of said elevator. A copy of the inspection service contract entered into between H. C. Evans and appellant is attached to the agreed state-

ment of facts, marked "Exhibit A," and incorporated therein (Agreed Statement of Facts, paragraph 8, Tr. 122).

On September 7, 1957, at a time when H. C. Evans was in sole possession of the premises, an employee of Evans, Kasper Hardmeyer, received certain crushing injuries from the freight elevator and eventually died as the result of said injuries (Agreed Statement of Facts, paragraph 9, Tr. 122). A wrongful death action was filed in the Superior Court, Sacramento County, California, by the heirs of Kasper Hardmeyer seeking recovery for his death against Erickson Bros., Emmanuel Schwaub, and Lloyd E. Hildebrand, individually and doing business as Valley Elevator Company, among others, alleging that the death was due to the negligent operation, maintenance and control of said elevator (Agreed Statement of Facts, paragraph 10, Tr. 122). On June 20, 1960, the jury returned a verdict for the heirs against all parties in the amount of $112,500.00, plus $918.03 costs (Agreed Statement of Facts, paragraph 11, Tr. 122).

The liability of Erickson Bros. and Emmanuel Schwaub, the owners of the premises, in the wrongful death action was predicated solely upon their nondelegable duties as owners of the premises, and was not predicated on any affirmative acts taken by them (Agreed Statement of Facts, paragraph 12, Tr. 123).

The liability of appellant was predicated on a finding of negligence in the performance of his inspection service contract with H. C. Evans and such negligence was a proximate cause of the death of Kasper Hard-

meyer (Agreed Statement of Facts, paragraph 13, Tr. 123).

In September 1960, appellee paid $40,000.00 to the heirs of Kasper Hardmeyer in return for a partial satisfaction of judgment and a full release and satisfaction of judgment against Erickson Bros. and Emmanuel Schwaub (Agreed Statement of Facts, paragraph 15, Tr. 123). Thereafter, appellee took an assignment from Erickson Bros. and Emmanuel Schwaub wherein appellee was assigned and subrogated to all their rights for indemnification for amounts paid on the wrongful death judgment. A copy of the "Assignment and Subrogation Receipt" is attached to the agreed statement of facts, marked "Exhibit B," and incorporated therein (Agreed Statement of Facts, paragraph 16, Tr. 123).

The present action was filed by appellee as plaintiff seeking indemnification against H. C. Evans and appellant for the $40,000.00 paid by appellee in partial satisfaction of judgment, plus interest, costs of defense, and attorney fees incurred in the wrongful death action (Agreed Statement of Facts, paragraph 17, Tr. 123).

On June 14, 1965, appellee executed a release of its claim against H. C. Evans. Coincidentally with this release, appellee and H. C. Evans entered into an "Assignment and Covenant Not to Execute." In the latter, appellee agreed not to look to any personal assets of H. C. Evans in satisfaction of said settlement in return for an assignment by H. C. Evans of any rights which he might have against any insurance

company insuring H. C. Evans against liability arising out of the death of Kasper Hardmeyer. These two agreements are attached to the agreed statement of facts, marked "Exhibit C" and "Exhibit D" (Agreed Statement of Facts, paragraph 18, Tr. 123 and 124).

To the date of trial, appellee has received no payment under the terms of the release and assignment agreements entered into with H. C. Evans (Agreed Statement of Facts, paragraph 19, Tr. 124).

On August 15, 1966, the cause proceeded to trial against appellant only on the stipulation between appellant and appellee that the case was to be submitted for judgment upon appellee's agreed statement of facts supplemented by briefs (Docket Entry dated August 15, 1966, Tr. 226).

On June 1, 1967, the lower court entered its memorandum for judgment wherein it awarded judgment to appellee and against appellant in the sum of $40,000.00, together with its costs of suit herein incurred (Tr. 173 to 183). The lower court further directed that the memorandum for judgment will constitute the findings of fact and conclusions of law by the court in accordance with Rule 52(a) of the Federal Rules of Civil Procedure, and directed counsel for appellee to prepare and present a judgment in accordance therewith (Tr. 183).

A copy of the agreed statement of facts and the exhibits attached thereto are set forth in an appendix attached to this brief.

The principal question presented is whether or not appellee is entitled to indemnity from appellant for the $40,000.00 paid by appellee on behalf of its insureds under the facts set forth in the agreed statement of facts and in the absence of a contractual or other special relationship between appellant and appellee's insureds.

A secondary question presented is the effect of the release given H. C. Evans by appellee and the assignment given appellee by H. C. Evans as the same relates to the amount recoverable from appellant.

SPECIFICATION OF ERRORS

The trial court erred in the following particulars:

1. In finding that appellee's insureds were held liable as a matter of law for the safe operation of the elevator (Tr. p. 178, li. 27 to 29).

2. In making a conclusion of law that it was appellant's duty under his inspection service contract with Evans to maintain the elevator or to maintain the elevator in a safe condition (Tr. p. 178, li. 23 and 24, and li. 29 and 30).

3. In making a conclusion of law that appellee's insureds were third party beneficiaries of appellant's inspection service contract with H. C. Evans (Tr. p. 178, li. 18 to 23).

4. In finding that the negligence of appellant in the performance of his inspection service contract with H. C. Evans resulted in the appellee's insureds'

subsequent liability to the heirs of Kasper Hardmeyer (Tr. p. 181, li. 3 to 9).

5. In finding that the negligence of appellee's insureds was passive and not affirmative (Tr. p. 180, li. 15 to 17).

6. In finding that the liability of appellee's insureds as owners of the warehouse is secondary and arises not from an active fault, but from the legal obligation that the owners have to provide a safe premises (Tr. p. 182, li. 11 to 14).

7. In finding that appellant's conduct caused the loss suffered by appellee (Tr. p. 183, li. 5 and 6).

8. In failing to make a conclusion of law that the absence of evidence of a causal connection or relationship between the negligence of appellant in the performance of his inspection service contract and the liability of appellee's insureds precludes appellee's claim for indemnity.

9. In failing to make a conclusion of law that the absence of any evidence as to the cause or causes of the accident and as to the disparity of gravity of fault or relative delinquency in the conduct of appellant and appellee's insureds with respect to said cause or causes precludes appellee's claim for recovery and implied indemnity.

10. In making a conclusion of law that California Code of Civil Procedure, Section 877(a), does not apply and, therefore, does not operate to reduce the claim of appellee against appellant in the amount stipulated in the release given H. C. Evans (Tr. p. 183, li. 10 to 16).

11. In failing to conclude from the facts as set forth in the agreed statement of facts that judgment should be entered in favor of appellant and in failing to enter judgment in appellant's favor.

ARGUMENT

THE TRIAL COURT'S FINDING THAT APPELLEE'S INSUREDS WERE HELD LIABLE AS A MATTER OF LAW FOR THE SAFE OPERATION OF THE ELEVATOR IS NOT SUPPORTED BY THE FACTS AND INCORRECTLY DESCRIBES THE LEGAL DUTY OF APPELLEE'S INSUREDS TO THE DECEASED UNDER THE AGREED FACTS AND THE LAW OF CALIFORNIA (Specifications of Error 1, 3, 5 and 6).

In its memorandum for judgment, the lower court states as follows:

> "If the owners are to be held liable as a matter of law for the safe operation of this elevator, and it was Valley's contractual duty to maintain the elevator in a safe condition, then the owners were third party beneficiaries of Valley's services." (Tr. p. 178, li. 27 to 31).

The first portion of this statement is not supported by any of the facts set forth in the agreed statement and actually conflicts with these facts. Appellee's insureds, Erickson Bros. and Emmanuel Schwaub, leased "the entire premises located at 921 Front Street, Sacramento, California," to the lessee, H. C. Evans (Agreed Statement of Facts, paragraph 5, Tr. 122). During the entire period herein relevant, the tenant, H. C. Evans, "had the sole right of possession to these premises" (Agreed Statement of

Facts, paragraph 6, Tr. 122). The use of the elevator in the premises by H. C. Evans "was with the express understanding that Evans Van & Storage was to be responsible for the use, maintenance and inspection of said elevator" (Agreed Statement of Facts, paragraph 7, Tr. 122). The liability of appellee's insureds, Erickson Bros. and Emmanuel Schwaub, was predicated solely on their nondelegable duties as owners of the premises and was not predicated on any affirmative acts taken by them (Agreed Statement of Facts, paragraph 12, Tr. 123). The owner of a building who leases the entire building to a lessee and does not retain possession of any portion of the building is not liable as a matter of law for the safe operation of an elevator in the building. This proposition is supported by numerous California cases, including: *Shotwell v. Bloom,* 60 Cal. App. 2d 303, 140 Pac. 2d 728, and *Pfingst v. Mayer,* 93 Cal. App. 2d 265, 208 Pac. 2d 1002. In the *Shotwell* case, *supra,* the owner of the property leased a dairy ranch to the tenant. The plaintiffs, employees of the tenant, moved into a farmhouse located on the property. The plaintiffs lit a fire in a defective fireplace, which resulted in the house burning down and destroying plaintiffs' personal property. The Appellate Court affirmed the judgment of the trial court in favor of the plaintiffs and found that there was substantial evidence that the owner had actual knowledge that the fireplace in the house was defective at the time the property was leased to the tenant and concealed this fact from the tenant. The court found that the case falls into the

exception to the general rule that the owner is not liable to his tenant or to the tenant's invitees for injuries caused by defects in the leased premises because the defect was hidden, the owner knew about it, and the owner did not inform the tenant.

In the *Pfingst* case, *supra,* the owner of the building, Marwedel, leased the sixth floor to the tenant, Mayer. The tenant was given exclusive use of a passenger elevator and the doors to the elevator on the other floors were locked. The tenant was also to pay for all expenses in the maintenance and repair of the elevator. Otis Elevator Company entered into a "service contract" under the terms of which Otis agreed to grease and oil the elevator, make minor adjustments and furnish minor supplies. The plaintiff performed work for the tenant as an independent contractor. He embroidered names on uniforms sold by the tenant and the charges were divided. The tenant took the elevator down to the first floor and left the elevator with the outside doors open. The elevator was moved to the sixth floor by someone and the outside elevator doors at the first floor were left open. When the plaintiff returned, he walked into the open shaft, fell to the bottom and was injured. There was evidence to the effect that the only way the elevator could be moved when the first-floor outside door was open was by use of the emergency button in the elevator which should have been covered by a glass plate. The glass plate had been missing for some time prior to the accident. The trial court granted a nonsuit in favor of Otis Elevator Company and a

directed verdict in favor of the property owner, Marwedel. The plaintiff appealed, and the Appellate Court sustained the judgment of the trial court. In answer to the plaintiff's argument that the property owner should be liable for his injuries in spite of the fact that the property owner was not in control of the elevator, the Appellate Court states as follows at 208 Pac. 2d 1008:

> "This argument is unsound. If it be assumed that Mayer was guilty of negligence, there is no principle of law by which Marwedel, the landlord, who was not in control of the premises, can or should be held liable. Such a holding would be contrary to the many cases generally holding that in the absence of fraud or deceit on the part of the landlord in concealing latent defects of which he has knowledge, and in the absence of a direct covenant to make repairs, the lessor is not liable to the tenant or others for injuries resulting from defects in the rented premises."

Appellant acknowledges that there are other exceptions to the general rule that when the owner leases the entire premises to a tenant, he is not liable for injuries occurring as the result of a defective condition on the premises unless the defective condition existed at the time the property was leased to the tenant and the owner knew or should have known of the defective condition. In *Finnegan v. Royal Realty Co.,* 35 Cal. 2d 409, 218 Pac. 2d 17, the owner leased the entire building to a tenant. When the building was leased to the tenant, the exit doors opened inward and not outward, which was a violation of a

safety ordinance of the City of Los Angeles. After the tenant moved in, he made further structural changes which resulted in the blocking off of one of the two exit doors, which was another violation of the ordinance and of which said fact the owner had knowledge. A fire started in the building and many of the employees of the tenant were injured or killed as the result of being unable to leave the burning building. In a majority opinion, the California State Supreme Court decided that when the owner knew that the tenant had altered the building in a manner which closed off one of the two exit doors in violation of a city ordinance, the owner had the duty to either terminate the tenancy or compel the tenant to comply with the ordinance. The minority opinion disagreed with the majority on this latter point.

Under the facts in this case, there is no evidence that the elevator in the building leased to H. C. Evans was altered or changed in any way or that there was any violation of an ordinance or regulation.

The trial court's finding that appellee's insureds were held liable as a matter of law for the safe operation of the elevator is not part of the facts as agreed to and, by inference, contains an erroneous conclusion of law based on the agreed facts.

THE LOWER COURT'S CONSTRUCTION OF THE INSPECTION SERVICE CONTRACT ENTERED INTO BETWEEN APPELLANT AND H. C. EVANS, AND ITS CONCLUSIONS AS TO THE RIGHTS AND DUTIES ARISING THEREFROM, ARE INCORRECT (Specifications of Error 2, 3 and 4).

The inspection service contract entered into between appellant and H. C. Evans is dated October 1, 1956 and was accepted by H. C. Evans on November 1, 1956. This inspection service contract was in effect from the date of its acceptance to the date of the accident, September 7, 1957. It is submitted that the language of this contract is clear and explicit, does not involve an absurdity, and therefore, under Section 1638 of the Civil Code of the State of California, the language of the contract should govern its interpretation.

In its memorandum for judgment, the lower court construed this inspection service contract as imposing the duty on appellant to maintain the elevator in a safe condition (Tr. p. 178, li. 29 and 30). However, the contract is devoid of any language that indicates an intention on the part of appellant and H. C. Evans that appellant was to maintain the elevator in a safe condition. Nowhere does the inspection service contract provide or even hint at a duty on the part of appellant to keep the elevator in repair or maintain the elevator in a safe condition. This agreement is substantially different from the maintenance agreements entered into by Otis Elevator Company in *Otis Elevator Co. v. Maryland Casualty Co.,* 95 Colo. 99, 33 Pac. 974, and General Elevator Co. in *Dahms v. General Elevator Co.,* 214 Cal. 733, 7 Pac. 2d 1013.

In both the *Otis Elevator Co.* and the *Dahms* cases, *supra,* the elevator companies specifically undertook in their contracts to maintain and keep the elevators in repair. In both cases, the liability of the elevator companies was predicated upon defective construction of or defective repairs made on the elevators.

It is further submitted that the lower court erred in concluding that appellee's insureds were third party beneficiaries of the inspection service contract entered into between appellant and H. C. Evans (Tr. p. 178, li. 30 and 31). As has been pointed out previously, both of the premises upon which this conclusion is based are incorrect. Appellee's insureds, the owners of the building were not held liable as a matter of law for the safe operation of the elevator. There is no such duty on the part of an owner who leases the entire building, including the elevator, to a tenant. Appellant's contractual duty under its inspection service contract with H. C. Evans was as provided in the contract itself, that is, to inspect the elevator and service it.

In order to establish that the owners of the building were third party beneficiaries of the contract, appellee must first of all establish that the inspection service contract was entered into by the parties to the contract with the intent to benefit the owners (*Woodhead Lumber Co. v. E. G. Niemann Inv.,* 99 Cal. App. 456, 278 Pac. 913). There is no evidence whatsoever in the agreed statement of facts that the inspection service contract was entered into for the benefit of appellee's insureds, the owners of the building. Rather,

paragraph 8 of the agreed statement of facts provides that appellant and H. C. Evans entered into the inspection service contract "in connection with the use of said elevator" (Tr. p. 122, li. 17). As further provided in the agreed statement of facts, "The use of this elevator was with the express understanding that Evans Van & Storage was to be responsible for the use, maintenance and inspection of said elevator" (Agreed Statement of Facts, paragraph 7, Tr. p. 122, li. 11 to 14). Under the agreed statement of facts, the inspection service contract was entered into for the benefit of those who used the elevator which, of course, included the deceased, Kasper Hardmeyer. As previously pointed out, the duties and responsibilities of appellant under its inspection service contract are of a different type and nature than the duties and responsibilities of appellee's insureds as owners of the property who have leased the entire property to a tenant. As previously pointed out, the owner of a building who is not in possession does not have the duty to inspect for defects that may arise after the tenant takes over possession (*Shotwell v. Bloom, supra* and *Pfingst v. Mayer, supra*).

THE LOWER COURT'S FINDINGS TO THE EFFECT THAT APPELLEE'S INSUREDS WERE HELD LIABLE AS THE RESULT OF SOME ACT OR OMISSION ON THE PART OF APPELLANT IS SUPPORTED BY NO EVIDENCE WHATSOEVER (Specifications of Error 4 and 7).

The findings contained in the memorandum for judgment to the effect that appellant's conduct caused the loss suffered by appellee (Tr. p. 183, li. 5 and 6),

and that the negligence of appellant in the performance of its inspection service contract with H. C. Evans resulted in appellee's insureds' subsequent liability to the heirs of Kasper Hardmeyer (Tr. p. 181, li. 3 to 9), are nowhere found in the agreed statement of facts. The agreed statement of facts does provide that the liability of appellant was predicated upon a finding of negligence in the performance of his contract with Evans Van & Storage and such negligence was a proximate cause of the death of Kasper Hardmeyer (Agreed Statement of Facts, paragraph 13, Tr. 123). Had the jury in the wrongful death case not have found that appellant was negligent in the performance of his personal service contract and that such negligence was a proximate cause of the death of Kasper Hardmeyer, the jury would not have returned its verdict against appellant; but this does not mean that appellee's insureds were found liable because of the negligence of appellant.

It is submitted that if it is proper for the lower court to make findings of fact in addition to those set forth in the agreed statement of facts, it would be far more plausible and logical to find that appellee's insureds leased the building to H. C. Evans without disclosing to H. C. Evans that the elevator had a defect of some type and that appellant's liability was based upon its failure to discover the defect. Under this hypothetical set of facts, appellant would be entitled to indemnification from appellee's insureds under the doctrine of *City and County of San Francisco v. Ho Sing,* 51 Cal. 2d 127, 330 Pac. 2d 802, and

a number of other indemnity cases which hold that a party who is held liable for negligently failing to discover a defect is entitled to indemnity from the party who caused the defect or who is primarily responsible for its existence (*Otis Elevator Co. v. Maryland Casualty Co., supra; Cahill Brothers, Inc. v. Clementina Company,* 208 Cal. App. 2d 367, 25 Cal. Rep. 301; *De La Forest v. Yandle,* 171 Cal. App. 2d 59, 390 Pac. 2d 52).

The fundamental point, however, is that the agreed statement of facts does not list as a fact that appellant's conduct caused the loss suffered by appellee, nor does it say that appellant's negligence in the performance of his inspection service contract resulted in appellee's insureds' subsequent liability. The lower court's findings on these two issues are based upon speculation and, as a matter of substantive law, it is difficult to imagine a situation where the property owner could be held liable for the negligence of an independent contractor employed by the tenant in the absence of actual knowledge on the part of the owner that the independent contractor had created a dangerous condition in violation of a safety ordinance, as in *Finnegan v. Royal Realty Co., supra.* In the case before this court, there is no evidence that appellant made any repairs at all to the elevator, nor is there any evidence that appellee's insureds had any knowledge whatsoever of any such repairs, assuming that repairs had been made.

IN ITS MEMORANDUM OF JUDGMENT, THE LOWER COURT IMPROPERLY FINDS AS FACTS MATTERS WHICH ARE NOT INCLUDED IN THE AGREED STATEMENT OF FACTS AND WHICH, IN MOST CASES, ARE BASED UPON SPECULATION (Specifications of Error 1, 4, 5, 6 and 7).

As stated in 3 *Am. Jur.* 2d, at pages 743 and 744,

> "The agreed statement of facts takes the place of the court's findings of fact, and findings by the court are neither necessary nor proper. This means that it is ordinarily error for the court to make findings of fact in addition to the facts included in the agreed statement, except for necessary inferences from the agreed facts or matters that may be proper subjects of judicial notice."

Yet, the lower court's decision is based entirely upon facts that are not included in the statement of facts, that are not proper subjects of judicial notice, and that are not necessary inferences from the agreed facts. In its memorandum of judgment, the lower court found as a fact that, in the prior wrongful death case, appellee's insureds were held liable as a matter of law for the safe operation of the elevator (Tr. p. 178, li. 27 to 29). On this point, however, the agreed statement of facts provides that the liability of appellee's insureds "was predicated solely on their nondelegable duties as owners of the premises and was not predicated on any affirmative acts taken by them" (Agreed Statement of Facts, paragraph 12, Tr. 123). It is not a necessary inference nor even a logical inference to find as a fact that the owners of a building who are not in possession were found liable as a matter of law for the safe operation of an elevator in the building.

In its memorandum of judgment, the lower court further found that appellant's negligence in the performance of his inspection service contract with H. C. Evans "resulted" in the subsequent liability of appellee's insureds to the heirs of Kasper Hardmeyer (Tr. p. 181, li. 3 to 9). However, paragraph 13 of the agreed statement of facts does not provide this, but rather, provides that the negligence of appellant in the performance of his inspection service contract "was a proximate cause of the death of Kasper Hardmeyer" (Tr. 123). It is submitted that it is certainly not a necessary inference from the facts that because appellant was found negligent and that appellant's negligence was a proximate cause of the death of Kasper Hardmeyer, that this negligence had anything whatsoever to do with the liability of appellee's insureds. As previously pointed out, if it were proper to engage in speculation, it would be far more logical to assume that the negligence of appellant had nothing whatsoever to do with the liability of appellee's insureds. The duties each owed to the deceased, Kasper Hardmeyer, were substantially different.

The same is true of the lower court's finding that the negligence of appellee's insureds was passive and not affirmative (Tr. p. 180, li. 15 to 17). Paragraph 12 of the agreed statement of facts provides that the liability of appellee's insureds was, "predicated solely on their nondelegable duties as owners of the premises and was not predicated on any affirmative acts taken by them" (Tr. 123). This fact does not lead to a necessary inference that the negligence of appellee's

insureds was passive and not affirmative as is indicated by the authority cited by the lower court itself. In its memorandum of opinion, the lower court quotes a portion of the decision in *Cahill Brothers, Inc. v. Clementina Company, supra* (Tr. p. 180, li. 4 to 14). The quoted portion of this case contains the following language:

> "The thrust of these cases is that if the person seeking indemnity personally participates in an affirmative act of negligence, *or is physically connected with an act or omission by knowledge or acquiescence in it on his part, or fails to perform some duty in connection with the omission which he may have undertaken by virtue of his agreement,* he is deprived of the right of indemnity." (Emphasis added).

The point is that the fact that appellee's insureds may not have taken any affirmative act does not necessarily raise the inference that their negligence was passive and not affirmative. Under the decision of the *Cahill Brothers, Inc.* case, *supra,* affirmative negligence includes not only affirmative acts, but a physical connection with an act or omission by knowledge or acquiescence in it. It also includes failure to perform some duty in connection with the omission which may have been undertaken by virtue of an agreement.

In its memorandum of judgment, the lower court acknowledges that its finding that the negligence of appellee's insured was passive and not affirmative is not contained in the statement of fact and is not a necessary inference from the agreed statement of facts. The court states,

> "This finding *is supported* by the stipulated fact which expressly stated that the owners' liability was based on a breach of a nondelegable duty and not on any affirmative act on their part." (Tr. p. 180, li. 17 to 20). (Emphasis added).

The lower court further finds that the negligence of the appellee's insureds is "secondary since it arises not from an active fault, but from the legal obligation that the owners have to provide a safe premises (Tr. p. 182, li. 12 to 14). The court quotes a portion of the decision in *Alisal Sanitary District v. Kennedy,* 180 Cal. App. 2d 69, 4 Cal. Rep. 379, which includes the following language:

> "Without multiplying instances, it is clear that the right of a person vicariously or secondarily liable for a tort to recover from one primarily liable has been universally recognized. But the important point to be noted in all the cases is that secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law, or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible." (Tr. p. 182, li. 3 to 9).

In its memorandum of judgment, the lower court concludes, "These terms are readily applicable to the facts in this action" (Tr. p. 182, li. 10 and 11). However, upon examination it is respectfully submitted that none of the terms are applicable to the facts in this action. There is no evidence that appellee's

insureds were vicariously or secondarily liable. There is no evidence that the fault or negligence of appellee's insureds was imputed to them or was constructive, nor based on any legal relation between appellee's insureds and appellant. The liability of appellee's insureds did not arise from some positive rule of common or statutory law, but, under the statement of facts, was predicated on their failure to perform their nondelegable duties as owners of the premises. There is also no evidence that appellee's insureds were held liable for a failure to discover or correct a defect or remedy a dangerous condition caused by the act of appellant. There is no evidence whatsoever in the statement of facts that there was any causal connection between appellant's negligence and the liability of appellee's insureds.

In its memorandum of judgment, the lower court concludes with respect to appellee's insureds that, "to make them suffer the loss caused by Valley's conduct would be inequitable." As previously pointed out, the statement of facts does not contain as a fact that appellee suffered any loss whatsoever as the result of appellant's conduct.

It is respectfully submitted that all of the ultimate facts necessary in order to reach a conclusion that appellee is entitled to indemnification from appellant have been added by the lower court in its memorandum of judgment as facts in addition to those set forth in the agreed statement of facts. This is so in spite of the fact that appellee, in its reply brief filed with the lower court, objected to appellant's asser-

tion of additional facts in contradiction to additional facts asserted by appellee in its opening brief. In its reply brief, appellee states as follows: "It was the clear understanding of plaintiff (appellee) that only issues of law remain to be decided" (Tr. p. 163, li. 20 to 22).

This was appellant's understanding also. In appellant's reply brief filed with the lower court, appellant states as follows:

> "Great American and Valley have submitted an agreed statement of fact; however, as will hereafter be shown, Great American makes additional factual assertions in its argument that are not contained in the agreed statement, and in one critical area, the additional 'fact' inserted by Great American is simply not true." (Tr. p. 142, li. 17 to 22).

It is respectfully submitted that it was error for the lower court to find as facts additional matters not set forth in the agreed statement of facts and to base its conclusions of law on these additional facts (*Saltonstall v. Russell, supra*).

UNDER THE AGREED STATEMENT OF FACTS, APPELLEE HAS NOT ESTABLISHED A RIGHT OF INDEMNITY AGAINST APPELLANT AS A MATTER OF LAW, AND THE JUDGMENT OF THE LOWER COURT SHOULD BE REVERSED (Specifications of Error 8, 9 and 11).

The implied indemnity cases are broken down into two basic groups, depending upon whether or not there is a contractual relationship between the two

parties. The most common example of contractual implied indemnity arises where an employer employs an independent contractor and becomes liable to a third party as the result of the negligence of the independent contractor in performing the work. In this type of situation, the employer of the independent contractor is entitled to indemnity from the independent contractor, provided that the employer did not contribute to the injury through any affirmative action (*Cahill Brothers, Inc. v. Clementina Company, supra; Alisal Sanitary District v. Kennedy, supra; San Francisco Unified School District v. California Building Maintenance Company,* 163 Cal. App. 2d 439, 328 Pac. 2d 785; *Otis Elevator Co. v. Maryland Casualty Co., supra*).

There was no contractual relationship between appellant and appellee's insureds. Even if it were found that appellee's insureds were third party beneficiaries of appellant's inspection service contract, appellee would still not be entitled to indemnity on this theory because there is no evidence that appellee's insureds were held liable as the result of any act or omission on the part of appellant.

The noncontractual implied indemnity cases are more difficult to classify or analyze. This Court has done so in the recent case of *United Air Lines, Inc. v. Wiener,* 335 Fed. 2d 379, 379 U.S. 951. The opinion in the *United Air Lines, Inc.* case has been cited with approval in *City of Sausalito v. Ryan,* 258 A.C.A. 92, 65 Cal. Rep. 391. In 335 Fed. 2d, at pages 398 and 399, this Court discusses the various situations where

noncontractual implied indemnity has been recognized. Each of the categories will be discussed separately as follows:

(1) Where the liability of the indemnitee is only imputed or vicarious because of a special relationship with the actual wrongdoer.

As has been previously pointed out, this is not the situation presented in this case. There is simply no evidence at all that the negligence of appellant was imputed to appellee's insureds.

(2) Where the indemnitee has performed an act at the direction of the indemnitor and has incurred liability as a result.

Appellee's insureds did not, of course, perform any act at the direction of appellant.

(3) Where the indemnitor has the duty to maintain safe premises and the indemnitee has failed to correct or discover the defect.

This category is not applicable for the reason that appellant did not have the duty to maintain the elevator in a safe condition as a matter of law. Appellee's insureds did not have this duty either. Again, however, there is no evidence of any causal connection between any act or omission on the part of appellant and the liability of appellee's insureds.

(4) Where the indemnitor sells defective goods or makes defective repairs.

There is no evidence that appellant made any repairs whatsoever to the elevator or that the making of repairs or the absence of making repairs resulted in the accident.

In its opinion in the *United Air Lines, Inc.* case, *supra,* this Court discusses additional situations which do not fit into any one of the above categories. In 335 Fed. 2d, at page 399, this Court states:

> "Thus, indemnification of a concurrently negligent tortfeasor is said to be based upon a disparity of duties of care owed by the tortfeasors to the injured party, the doctrine of last clear chance or discovered peril, a disparity of gravity of the fault of the tortfeasors, or a combination of these."

This presents the basic problem before this Court and explains the dilemma faced by the lower court. The facts as set forth in the agreed statement of facts are wholly inadequate to establish any disparity in the fault or duty between appellee's insureds and appellant. In all of the implied indemnity cases, the basic consideration starts with a discussion of the specific cause or causes of the accident and the respective duties of the indemnitee and indemnitor. It is submitted that before one can make an analysis of the disparity of gravity of the fault of the indemnitee and indemnitor, one first must know the specific cause of the accident and the part each played in bringing about the cause. It is submitted that it is of extreme importance that there is absolutely no evidence in this case as to what caused the accident resulting in the death of Kasper Hardmeyer. There is simply no way to consider any disparity of duties of care between appellant and appellee's insureds, or any disparity of gravity of fault between them. Was the accident caused by one defect or a combination of defects?

There is no evidence that the liability of appellee's insureds was based on imputed negligence or was constructive only. Rather, the evidence is that their liability was predicated on their nondelegable duties as owners of the premises. The agreed statement of facts does not, however, state which of these duties were violated by appellee's insureds. The same problem exists with respect to appellant. Under the evidence, appellant was found negligent in the performance of his contract. There is no evidence as to which of the duties imposed upon appellant under his inspection service contract were violated by him. The same problem is present when one attempts to analyze the disparity of gravity of the fault between appellee's insureds and appellant. As stated by this Court in the *United Air Lines, Inc.* case, *supra,* in 335 Fed. 2d, at page 399, where the offense is in no respect immoral, "it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers." The crucial fact is that there is no evidence relating to the relative delinquency of appellee's insureds and appellant. In the *City of Sausalito v. Ryan* case, *supra,* in determining that the cross-complaint stated a cause of action in implied indemnity, the court analyzed the actual acts and conduct of the parties as disclosed in the pleadings. In 65 Cal. Rep., at page 395, the court concludes, "If the *facts* prove to be as here alleged, it would seem equitable and just that implied indemnity be allowed to the City against Ryan and Kelly" (emphasis added). The appellate court did not hold that

whenever an accident happens and a third party sues the drivers of two automobiles and the City of Sausalito, the City of Sausalito is entitled to indemnity from the drivers of the two cars. Yet this is what the lower court has done in this case. Excluding the additional facts set forth in the memorandum of judgment which are not part of the agreed statement of facts, the lower court has in effect decided that whenever the employee of the lessee of a building is injured while riding on an elevator and recovers judgment against both the owner of the building and an elevator company that is servicing the elevator under an inspection service contract, the owner is entitled to indemnity against the elevator company. Such a rule is not equity; rather, it is indemnity without equity.

There is not one shred of evidence that there was any distinction between either the duties of care appellant and appellee's insureds owed the deceased or the gravity of fault.

SECTION 877 OF THE CODE OF CIVIL PROCEDURE OF THE STATE OF CALIFORNIA SHOULD APPLY TO THIS CASE, AND THE AMOUNT OF APPELLEE'S CLAIM SHOULD HAVE BEEN REDUCED BY THE AMOUNT STIPULATED IN THE RELEASE GIVEN H. C. EVANS, THE SUM OF $40,000.00. (Specifications of Error 10).

Section 877 of the Code of Civil Procedure of the State of California provides in part as follows:

> "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before ver-

> dict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort:
>
> "(a) It shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and . . ."

A copy of the release given H. C. Evans is attached to the agreed statement of fact and marked "Exhibit C." It also appears in the Transcript at pages 129 and 130. The release recites that it is in consideration of the sum of $40,000.00. This release was given to H. C. Evans on June 14, 1965 and H. C. Evans gave to appellee an assignment and covenant not to execute on the same date (Agreed Statement of Facts, paragraph 18, Tr. 123).

In its memorandum for judgment, the lower court concludes that Section 877(a) of the Code of Civil Procedure does not apply because of the provisions of subsection (f), Section 875, Code of Civil Procedure, which reads as follows:

> "This title shall not impair any right of indemnity under existing law, and where one tortfeasor judgment debtor is entitled to indemnity from another, there shall be no right of contribution between them."

Reducing the claim against appellant by the amount stipulated in the release, $40,000.00 does not impair appellee's right of indemnity, but operates to reduce

the amount recoverable against appellant. Appellee does have an assignment from H. C. Evans in the amount of $40,000.00 of all rights which H. C. Evans has against his insurance companies (Clerk's Tr., pp. 131 and 132).

Except as modified by Section 877 of the Code of Civil Procedure, the rule is that a release of one joint tortfeasor is the release of all joint tortfeasors *(Apodaca v. Hamilton,* 189 Cal. App. 2d 78, 10 Cal. Rep. 885). If Section 877 of the Code of Civil Procedure does not apply to this case, then the release given to H. C. Evans should constitute a release of appellant. If it does apply, then the claim against appellant should be reduced in the amount stipulated in the release, $40,000.00. The lower court does recognize that if Section 877 of the Code of Civil Procedure is not applied, under the circumstances, a double recovery might be possible. The lower court states, "This decision is conditioned upon the plaintiff recovering no more than this sum from the combined sources of the defendant, Evans, or its insurers. To hold otherwise and allow a double recovery would defeat the equitable considerations in favor of indemnification" (Tr. p. 183, li. 20 to 24). However, the judgment that was entered on July 3, 1967 was not so conditioned (Tr. 185).

CONCLUSION

There is a complete absence in the agreed statement of facts of any facts as to what was wrong with the elevator, who was responsible for the defect or defects, and in what manner, or concerning the relative conduct of appellant and appellee's insureds in the premises. The agreed statement of facts does not recite that appellee's insureds were found liable as the result of any act or omission on the part of appellant or that the negligence of appellant as found by the jury in the wrongful death case was in any way imputed to appellee's insureds or constructively fastened upon them.

Appellee's insureds and appellant were all found jointly liable for the wrongful death of Kasper Hardmeyer. Although appellee seeks indemnification, it offered no evidence at the trial that appellant was in any way more culpable or more responsible for this tragic event than its own insureds, the property owners.

The entire judgment in this case is based on facts that are not part of the agreed statement of facts and conclusions of law that are erroneous. Without the assistance of these additional facts and these erroneous conclusions of law which make it appear as though appellee's insureds were held liable without fault, appellee's claim is without an equitable foundation. Appellee has not carried its burden of establishing facts that make it equitable and just that implied indemnity be allowed to appellee. Without these facts,

the allowance of implied indemnity to appellee does not constitute equity; but rather, a miscarriage of justice.

Dated, Sacramento, California,
April 1, 1968.

Respectfully submitted,
JOSEPH P. VAN DEN BERG,
Attorney for Appellant.

CERTIFICATE OF ATTORNEY

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH P. VAN DEN BERG
Attorney.

(Appendix Follows)

Appendix

Appendix

Cooley, Crowley, Gaither,
Godward, Castro & Huddleson
Thomas A. H. Hartwell
333 Montgomery Street
San Francisco, California
981-5252
Attorneys for Plaintiff

In the United States District Court
for the Northern District of California
Northern Division

No. Civil 8313

Great American Insurance Company, a corporation,
Plaintiff,
vs.
H. C. Evans, doing business as Evans Van & Storage Company, and Lloyd E. Hildebrand, doing business as Valley Elevator Company,
Defendants.

AGREED STATEMENT OF FACTS

The following facts are agreed and stipulated between counsel for plaintiff, Great American Insur-

ance Company, a corporation, and counsel for defendant, L. E. Hildebrand dba Valley Elevator Company:

1. Plaintiff Great American is a corporation duly organized and existing under the laws of the State of New York, with its principal place of business in New York City, New York, and is authorized to transact insurance business in the State of California.

2. Defendant, L. E. Hildebrand dba Valley Elevator Company (hereinafter Valley Elevator) is a citizen and resident of the State of California.

3. The amount in controversy is in excess of $10,000.00.

4. Erickson Brothers, a corporation and Emmanuel Schwaub were the owners at all times herein mentioned of a warehouse building located at 921 Front Street, Sacramento, California.

5. Prior to October 1, 1956, and during the entire time herein mentioned, H. C. Evans dba Evans Van and Storage Company leased from Erickson Brothers and Schwaub the entire premises located at 921 Front Street, Sacramento, California.

6. Said lease was on a month to month basis and during the entire period of time herein mentioned Evans Van and Storage had the sole right of possession to these premises.

7. Located in the building at 921 Front Street, was a freight elevator which was used by Evans Van and Storage in the furtherance of its warehouse business. The use of this elevator was with the express understanding that Evans Van and Storage was to

be responsible for the use, maintenance and inspection of said elevator.

8. Evans Van and Storage employed Valley to place the freight elevator in working condition and entered into an inspection service contract in connection with the use of said elevator. A copy of this contract is attached as Exhibit "A" to this stipulation and incorporated herein.

9. On September 7, 1957, at a time when Evans Van and Storage was in sole possession of the premises, an employee of Evans, Kasper Hardmeyer, received certain crushing injuries from this freight elevator and eventually died as a result of said injuries.

10. A wrongful death action was filed in the Superior Court, Sacramento County, California, by the heirs of Kasper Hardmeyer, seeking to recover for his death against Erickson Brothers, Emmanuel Schwaub and Lloyd E. Hildebrand, individually, and dba Valley Elevator Company, among others, alleging that the death was due to the negligent operation, maintenance and control of said elevator.

11. On June 20, 1960, the jury returned a verdict for the heirs against all parties in the amount of $112,500.00 plus $918.03 costs.

12. The liability of Erickson Brothers and Emmanuel Schwaub the owners of the premises was predicated solely on their non-delegable duties as owners of the premises and was not predicated on any affirmative acts taken by them.

13. The liability of Valley Elevator was predicated on a finding of negligence in the performance of their contract with Evans Van and Storage and such negligence was a proximate cause of the death of Kasper Hardmeyer.

14. Prior to September 7, 1957, plaintiff Great American issued to Erickson Brothers a comprehensive multiple liability policy, Form SF 51721 (Pacific Coast), Number LX 46553, which policy was in effect on September 7, 1957.

15. In September, 1960, plaintiff Great American paid forty thousand dollars ($40,000.00) to the heirs of Kasper Hardmeyer in return for a partial satisfaction of judgment and a full release and satisfaction of judgment against Erickson Brothers and Schwaub.

16. Thereafter plaintiff, Great American, took an assignment from Erickson Brothers and Schwaub, wherein plaintiff was assigned and subrogated to all their rights for indemnification for amounts paid on the wrongful death judgment. A copy of the "Assignment and Subrogation Receipt" is attached hereto as Exhibit "B" and incorporated herein.

17. The present action was filed seeking indemnification against Evans Van and Storage and Valley Elevator, for the forty thousand dollars ($40,000.00) paid by Great American in partial satisfaction of judgment, plus interest, costs of defense and attorney fees incurred in the wrongful death action.

18. On June 14, 1965, plaintiff executed a release of its claims against Evans Van and Storage. Coincidentally with this release, plaintiff and Evans entered into an "Assignment and Covenant Not to Execute". In the latter, Great American agreed not to look to any personal assets of Evans in satisfaction of said settlement in return for an assignment by Evans of any rights which he might have against any insurance company insuring Evans against liability arising out of the death of Kasper Hardmeyer. Copies of these agreements are attached hereto as Exhibits "C" and "D".

19. To this date plaintiff, Great American, has received no payment under the terms of this release and assignment.

Cooley, Crowley, Gaither,
Godward, Castro & Huddleson
Thomas A. H. Hartwell
By Paul A. Renne, Attorneys for
plaintiff, Great American
Insurance Company

Joseph P. Van Den Berg
Attorney for defendant Hildebrand

Exhibit "A"

FRESNO SACRAMENTO

VALLEY ELEVATOR COMPANY

INSPECTION SERVICE CONTRACT

Sacramento, California
October 1, 1956

To Dean Van Lines
1523 – 18th St.
Sacramento, California

We propose to furnish Inspection Service on
One Freight Elevator, State No. 1138

located at 917 Front Street, Sacramento, California from October 1, 1956 and continuing thereafter until this agreement is terminated by 30 days' written notice to that effect given in writing by either of us, for the sum of Eleven & no/100 ($11.00) dollars per month, payable monthly. You agree to pay, as an addition to the price herein quoted, the amount of any tax based upon the transfer, use, ownership or possession of the equipment to which this proposal relates, imposed by any law enacted after the date of this proposal.

This service shall consist of a semi-monthly examination of the elevators, including lubricating and cleaning machine, motor, controller, bearings and guides; making necessary minor adjustments; emergency call back service will also be provided at any hour. The following accessory equipment is included.

Hatchway gates
Hatchway gate contact locks

In addition we will furnish the following supplies as and when necessary; carbon and copper contacts, contact insulations and contact springs; braided and cable connectors, contact holders and distance pieces for all controller, brake, governor, interlock, selector, (except commutator sides) relay panel, stopping and car switches and push buttons; lamps for signal system; motor and generator brushes; oils, greases, rope preservatives and cleaning materials.

All work is to be performed during our regular working hours of our regular working days, unless otherwise specified.

This proposal, when accepted by you below and approved by an authorized representative, together with the provisions printed on the back hereof, shall constitute the contract between us, and all prior representations or agreements not incorporated herein are superseded.

Valley Elevator Company
By L. E. Hildebrand
Approved, for Valley Elevator Company

.....
Authorized Representative

Date.....

Accepted in Duplicate
By Evans Van & Storage

Date November 1, 1956
(By) H. C. Evans

It is agreed that we assume no liability for injuries or damage to persons or property except those directly due to our acts or omissions; and that your responsibility for injuries or damage to persons or property while on or about the elevators referred to is in no way affected by this agreement. We shall not be liable for any loss, damage, or delay caused by strikes, lockouts, fire, explosion, theft, floods, riot, civil commotion war, malicious mischief, act of God, or by any cause beyond our reasonable control, and in any event we shall not be liable for consequential damages.

Exhibit "B"

ASSIGNMENT AND SUBROGATION RECEIPT

In consideration of Great American Insurance Company's having defended each of the undersigned and indemnified them in that certain action heretofore brought in the Superior Court in and for the County of Sacramento, entitled and numbered Eva Hardmeyer, Albert Hardmeyer, Richard Hardmeyer, Robert Hardmeyer, Mary Lou Hardmeyer and Robert Hardmeyer, plaintiff, v. Valley Elevator Company, a co-partnership, Herbert Barth and Lloyd E. Hildebrand, individually and as co-partners, dba Valley Elevator Company; Dean Van Lines, Inc., a corporation; Erickson Construction Company, a corporation, Doe One, Doe Two and Doe Three, defendants, No. 115241, and pursuant to the subrogation provision of the liability policy under which said defense and said indemnification was provided, each of the undersigned hereby subrogates, assigns and transfers to the said company all of the rights, claims, demands and interests which each of the undersigned has or may have against all parties against whom each of the undersigned has or may have any right of indemnification arising out of the accident described in the complaint in said action and said company is hereby authorized and empowered to sue, compromise or settle the same in the name of each of the undersigned or otherwise, but for the sole use of said company and at its own cost, and it is further

authorized to collect and receipt for any moneys which may be paid upon said claim; to endorse in the name of each of the undersigned in its or his interest and behalf, any checks or drafts and to retain the proceeds thereof; and said company is hereby constituted the attorney in fact for each of the undersigned for said purposes and to sign releases and to execute any and all contracts, documents or releases, in the name of each of the undersigned, that may be necessary in the prosecution, litigation or settlement of said claims.

Dated this 16th day of May, 1961.

Erickson Bros., a corporation
By Laughlin E. Erickson

By /s/ Emmanuel Schwab
Emmanuel Schwab

Exhibit "C"

RELEASE

For, And In Consideration Of, the sum of Forty Thousand Dollars ($40,000.00), the undersigned Great American Insurance Company does hereby release and discharge H. C. Evans individually, and H. C. Evans, doing business as Evans Van & Storage Company, from any and all claims in any way arising out of that certain accident occurring on or about September 7, 1957, when one Kasper Hardmeyer suffered injuries resulting in his death while riding in an elevator at certain premises being occupied by Evans Van & Storage Company.

There are included within this release, but not by way of limitation of anything hereinabove stated, any and all claims in any way arising out of the complaint on file herein in that certain civil action entitled Great American Insurance Company, a corporation, v. H. C. Evans, et al., Civil Action No. 8313, United States District Court, Northern District of California, Northern Division, including any and all claims for indemnity as to any amounts which Great American Insurance Company may have paid in connection with liability arising out of said injury and death.

It is understood and agreed that this is a compromise settlement of a disputed claim, and nothing contained herein shall be construed as admission of liability on the part of any person or party to any other person or party.

It is understood and agreed that this release includes claims which have arisen as well as those which may arise, known or unknown, suspected or unsuspected. In this connection the parties have been advised of the provisions of Civil Code § 1542, and the benefits of said section are expressly waived. Said section provides:

> "Section 1542. (Certain claims not affected by general release.) A general release does not extend to claims which the creditor does not know or suspect exist in its favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

This release does not release any person or party except as named herein.

The foregoing release has been read and explained to undersigned by undersigned's counsel.

Dated: This 14 day of June, 1965.

Great American Insurance Company
By /s/ J. E. Mockett
San Francisco Regional
Claim Manager

Exhibit "D"

ASSIGNMENT AND COVENANT NOT TO EXECUTE

Recitals

1. Great American Insurance Company, a corporation (hereafter called "Great American"), has entered into a release agreement, by way of compromise settlement, with H. C. Evans, individually, and H. C. Evans, doing business as Evans Van & Storage Company (hereafter called "Evans"), to release Evans of and from all claims and demands in any way arising out of the action of Great American Insurance Company vs. H. C. Evans, et al., Civil Action No. 8313, United States District Court, Northern District of California, Northern Division, in consideration of $40,000.00.

2. It is the desire of the parties hereto that Evans shall assign to Great American any and all rights of Evans against any liability insurance carrier insuring as to liabilities arising in Evans by virtue of that certain accident occurring to one Kasper Hardmeyer on or about September 7, 1957 when said person suffered injuries and resultant death while riding in an elevator.

3. It is the desire of Great American in consideration of the same to enter into a covenant not to execute with Evans upon any personal assets of Evans in satisfaction of said $40,000.00 compromise settlement of Evans, in return for said assignment from Evans to Great American of Evans' rights against each such liability insurance carrier.

Now, Therefore, It Is Agreed That:

1. Evans does hereby assign and convey to Great American any and all rights which Evans may have against any and all liability insurance carriers, which may be in any way responsible to Evans to insure against liability of Evans for the injuries and resultant death sustained by said Kasper Hardmeyer on or about September 7, 1957.

2. In consideration of the foregoing Great American does agree and covenant with Evans that it shall not execute upon any personal assets of Evans to satisfy any of said $40,000.00 obligation incurred by Evans to Great American by virtue of the compromise settlement and release.

3. It is understood and agreed that Evans shall execute any and all documents reasonably required by Great American to further the intent of the parties, and to enable Great American to prosecute claims and necessary legal proceedings against each such liability insurance carrier of Evans to recover such amounts as said liability carriers may owe to Evans for any such liability of Evans by virtue of said accident and said compromise settlement of $40,000.00.

Dated: This 14 day of June, 1965.

Great American Insurance Company
By /s/ J. E. Mockett
San Francisco Regional
Claim Manager

H. C. Evans
Evans Van & Storage Company
By

Filed, August 12, 1966,
James P. Welsh, Clerk.